COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Department Report Re:	)	
Double Utility Poles	)	D.T.E. 03-87
	)	

INITIAL COMMENTS OF NSTAR ELECTRIC COMPANY

I. INTRODUCTION

On September 10, 2003, the Department of Telecommunications and Energy (the "Department") issued a Notice of Public Hearing and Request for Comments (the "Request for Comments") in response to Section 110 of Chapter 46 of the Acts of 2003 ("Section 110"). Section 110 requires the Department to issue a report by November 28, 2003 to the House Committee on Ways and Means, the Senate Committee on Ways and Means and the Joint Committee on Government Regulations regarding the Department's regulations and proposed legislation for enforcement of G.L. c. 164, § 34B ("Section 34B") which requires distribution companies and telephone companies "engaging in the removal of an existing pole and the installation of a new pole in place thereof [to] complete the transfer of wires, all repairs, and the removal of the existing pole from the site within 90 days from the date of installation of the new pole…".[1] Boston Edison Company, Cambridge Electric Light Company, Commonwealth Electric Company (collectively, "NSTAR Electric") hereby file the following comments regarding the Department's investigation in this proceeding.

[1] G.L. c. 164, § 34B also provides an exception to this requirement for poles installed in the context of an "approved commercial or industrial construction project, the completion of which is expected to take longer than one year." Such "old" poles are required by this statute to be removed within six months from the date of installation of the "new" pole. G.L. c. 164, § 34B.

II. BACKGROUND AND PROCEDURAL HISTORY

Section 110 specifically directs the Department to hold a public hearing and:

> issue a report related to reducing the number of double poles within the commonwealth pursuant to [G.L. c. 164, § 34B]. The report shall include the [D]epartment's recommendations and proposed legislation for enforcement of this section and waivers from this section. The [D]epartment shall report to the committees on ways and means and the joint committee on government regulations its recommendations and proposed legislation to provide penalties for the enforcement of this section. The [D]epartment shall also provide an analysis of whether local enforcement by ordinance or by-law is preferable to statewide enforcement of this section.

St. 2003, Chapter 46, Section 110.

The Department held a public hearing and technical conference in this proceeding on September 30, 2003. On October 2, the Department requested that NSTAR Electric, Fitchburg Gas and Electric Light Company, Massachusetts Electric Company, Nantucket Electric Company, Western Massachusetts Electric Company (collectively, the "Electric Companies") and Verizon New England, d/b/a Verizon Massachusetts ("Verizon MA") provide the Department with the following information in order to facilitate its report to the legislature:

(1) each company's policies and practices to reduce and prevent the accumulation of double poles subject to its control;

(2) the status and functioning of the Pole Lifecycle Management system ("PLM"), including the effectiveness of this system in meeting the goal of a reduction in the number of double poles; and

(3) information regarding:

  (a) the number of double poles that existed in each municipality prior to the implementation of the PLM in February 2003;

  (b) the number of pre-PLM double poles that are still in place in each municipality;

  (c) the number of double poles in each municipality created post-

implementation of the PLM;

(d) the number of poles in each municipality that are still in place today that were created post-implementation of the PLM; and

(e) the aggregate number of double poles owned or set by the company that were in existence prior to the implementation of the PLM in February 2003, and the number of those pre-PLM double poles that are still in place today.

October 2, 2003 Hearing Officer Memorandum at 1-2.

As described below, the NSTAR Electric has been working diligently with other electric companies and Verizon MA to implement the PLM system, which facilitates notification to pole tenants regarding their responsibilities to move their facilities from an old pole to a new pole after installation of a double-pole set. Moreover, during these past several months, NSTAR Electric, the other electric companies and Verizon MA have been working with the designer of the PLM software to add features which will allow the Electric Companies and Verizon MA to improve the performance of PLM even more. The companies now have the tools and systems through which they can notify attaching parties and coordinate the activities needed to remove double poles. In its report to the Legislature, the Department should acknowledge the progress that has been made by the Electric Companies and Verizon MA and recommend that the companies be given the time necessary to implement the procedures and processes that will, over the long term, minimize the presence of double-pole sets.

Moreover, for the reasons outlined below, the Department should reject recommendations to cede its jurisdiction over the enforcement of Section 34B to municipalities or to impose penalties on the Electric Companies and Verizon MA relating to enforcement of Section 34B. The contractual arrangements between the Electric

Companies, Verizon MA and pole tenants regarding the procedures by which pole facilities shall be installed, moved or removed, must be respected in any consideration of improving enforcement of such contracts. Moreover, the enforcement of these contractual terms involve the safety and reliability of basic utility services throughout the Commonwealth and should not be delegated to hundreds of separate municipalities. Diffusing administrative enforcement will result in an unwieldy system of differing standards, policies and review procedures that would complicate, not facilitate, the ability of the Electric Companies and Verizon MA to minimize double poles. Accordingly, the Department should recommend to the Legislature that the Department remain the enforcement authority for Section 34B and allow the Department to continue to work with the Electric Companies and Verizon MA to reduce the number of double-pole sets that are in place.

III. COMMENTS

Unfortunately, there is no quick or easy way to minimize the number of double-pole sets, in large part, because of the changes in the telecommunications market. Until fairly recently, attachments to utility poles were generally limited to the local electric company, the local telephone company, and, possibly, the local cable television company. The poles were owned by the electric company and/or the telephone company, and the moving of the limited number of attachments needed to be coordinated only between a small number of regulated entities. Now, the number of pole attachments on any given pole may also include one or more largely unregulated competitive telecommunications providers and municipal communications systems. Moreover, a double-pole set can be removed only after all attachments have moved by each respective company. The

coordination necessary to ensure that all parties move all of their pole attachments provides a significant challenge.

Under the pole-attachment agreements, each entity is responsible for moving its own facilities, and the moving of the attachments must occur in the proper sequence for safety and reliability purposes. Thus, numerous parties must coordinate their actions, and the failure of just one entity to perform, will prevent the timely elimination of the second pole. The pole-attachment contracts provide for remedies if third-party attachers fail to comply with their obligations; but coordinating actions, and identifying and acting on any non-compliance has become complex enough to require NSTAR Electric to work in concert with the other electric companies and Verizon-MA to develop the PLM system, which provides a centralized database and automated notification procedures. This process is being implemented and fine-tuned at this time, and is the best long-term means of minimizing the number of double poles in the Commonwealth.

A. The Electric Companies and Verizon MA Are Implementing the PLM System in Order to Facilitate the Removal of Double Poles.

1. NSTAR Electric's Policies and Practices for Reducing Double Poles/Status of the PLM System

In light of NSTAR Electric's efforts to upgrade its distribution system over the last few years, the Company has installed new poles in many locations to ensure the reliable supply of electricity to the Company's customers. However, the Company has recognized that the presence of double-poles, although necessary to ensure reliable service, is aesthetically unpleasant and generates complaints at the local level to municipal officials. Accordingly, the Company advocates the practice of "cutting and kicking" poles, whenever possible, to reduce the time required to remove double-pole

sets. Moreover, the Company has instituted daily or weekly transfer and removal targets at its Service Centers.

In addition, as noted previously and as recognized by the Department, NSTAR has been working since early 2002 with other electric companies Verizon MA, and InQuest Technologies, Inc. ("InQuest") to develop the PLM software in order to facilitate the removal of double poles.[2] As noted by NSTAR Electric in an April 9, 2002 letter to the Department, prior to the implementation of the PLM system, NSTAR Electric maintained an inventory of double-pole sets throughout their service territories, which was available to all of NSTAR Electric' pole tenants and municipal officials. Communications between NSTAR Electric and NSTAR Electric' pole tenants and municipal officials typically occurred via NSTAR Electric's various service centers.

The PLM system, which did not go into operation until February 2003, is an enhanced system that facilitates notification of pole tenants of the existence of double poles. This will ensure that when a second pole is installed, each entity with an attachment will be notified electronically, in turn, when it must move its equipment. The system is designed to provide both the tools and the ability for companies to better manage their inventory of double-pole sets and better enforce the terms of pole

[2] On January 9, 2002, the Department sent a letter to NSTAR Electric seeking information regarding the NSTAR Electric's inventory of "double poles" in its service territory (the "January 9 Letter"). The Department requested a double-pole inventory to enable it to implement a system of coordination and reporting among utility companies to remove double poles and prevent their accumulation in the future (id. at 2). Specifically, the Department asked NSTAR Electric (and other utility companies) to prepare: (1) an inventory of existing double-pole sets owned by NSTAR Electric, identifying, where appropriate, whether NSTAR Electric or NSTAR Electric's tenants need to relocate equipment to the new pole; and (2) a description of the NSTAR Electric's practices in notifying and reminding NSTAR Electric's tenants of the need to relocate equipment (id.). In addition, the Department suggested that NSTAR Electric coordinate its response with other utility companies in the interest of accuracy (id.). NSTAR Electric submitted the Department information in response to its request on April 9, 2002.

agreements so that all work can be completed and old poles removed in a timely manner. The Company has identified a supervisor in each of its Service Centers to have responsibility for PLM system data entry, updating and management. The benefits and process improvements that have resulted from the development of the PLM system include: (1) the development of common, statewide database; (2) mechanized project-management functions; (3) web access to all users and the Department; (4) easy data-base updates through direct user inputs; and (5) elimination of much of the manual tracking and transfer notifications that have been required historically. However, because the implementation of the PLM system is still in its infancy, additional time is necessary to work with the system to better facilitate coordination among pole owners and pole tenants regarding transferring pole facilities and removing double-pole sets.

2. Double-Pole Data

The Department requested specific information from the Electric Companies and Verizon MA regarding the number of double-poles in each companies' respective service territory, both before and after the roll-out of the PLM software in February 2003 (October 2 Memorandum at 1-2). The responses to questions 3(a) and 3(c) are attached to the comments filed by Verizon MA. However, the PLM system, as currently designed, cannot readily produce reports to respond to the Department's questions 3(b), (d) and (e).

The PLM system is designed primarily as a management tool to facilitate coordination among pole owners and pole tenants to move pole attachments in a timely fashion. If the Department seeks reports in the future from the Electric Companies and Verizon MA to respond to specific questions, the Electric Companies and Verizon MA, of course, will work with the Department to design reports to monitor the progress of the companies in mitigating the prevalence of double-pole sets. The Electric Companies and

Verizon MA, in turn, can then determine what the most cost-effective means might be to upgrade the PLM system in order to respond to the Department's inquiries.

B. The Department Should Not Recommend to the Legislature That Municipalities be Granted Powers to Enforce G.L. c. 164, § 34B.

Both Section 110 and some municipal participants at the Department's September 30 public hearing/technical conference raise the issue of allowing local enforcement of Section 34B, rather than statewide enforcement through the Department (see, e.g., Public Hearing Tr. at 27). In particular, some participants recommended allowing local enforcement of the statute by encouraging the use of G.L. c. 86, § 7 by municipalities to remove poles (Tech. Conf. Tr. at 2; 6-8). As discussed below, for legal, practical, reliability and safety reasons, the Department should not recommend to the Legislature that municipalities be granted authority either to remove, or order the removal of, pole attachments or poles.

The Department should reject the request of some municipalities to enable them to use G.L. c. 86, § 7 to order the removal of double-pole sets (see Technical Conference Tr. at 2, 6-8). G.L. c. 86, §7 was originally enacted in 1889, long before modern communications, safety and electricity facilities were used on poles. The statute simply states that "the alderman or selectmen may cause the removal from public ways and places of unused poles, wires, structures or other appliances, at the expense of the owners thereof." G.L. c. 86, § 7. First, the statute, by its terms, appears to be applicable only to abandoned or otherwise "ununsed" poles. In the case of double-pole sets, both sets of poles are being utilized until such time as the last tenant has moved its facilities to the newer pole in the set. Accordingly, in the vast majority of instances where double-pole

sets are in place, both poles and the wires thereon are being used and thus, G.L. c. 86, § 7 would be inapplicable.

Moreover, for safety and reliability reasons, municipalities should not be empowered to cause the movement of facilities or the removal of poles, either pursuant to G.L. c. 86, § 7, or any other statutory provision. NSTAR Electric's pole agreements require proper procedures and electrical codes to be followed for installation, transfer and removal of pole facilities; procedures that NSTAR Electric employees are specifically trained and certified to perform. Moreover, these provisions are designed to ensure that appropriate duties and liabilities regarding installing and removing pole attachments are assigned to the appropriate party to the agreement in order to ensure safe and reliable service over such facilities. If municipalities were encouraged to "cause" the movement or removal of pole attachments, neither the owners of the poles or the attachments could ensure that the proper safety precautions are being utilized by the municipalities or their private contractors. Certain municipal participants at the Department's technical conference made comments consistent with this position.[3] Similarly, if municipalities transferred pole attachments or removed poles, neither the Electric Companies nor Verizon MA could ensure that the service provided by the attachments would not be affected adversely. This fact was also recognized at the Department's technical

[3] Mr. Voutour, from the City of Somerville stated that he disagreed with the suggestion by the town of Lexington that municipalities be empowered to transfer pole attachments by noting: "…I would never allow that in Somerville, for a couple for very valid reasons. The utilities basically pointed out most of the highly technical reasons: You want somebody competent, technical, that knows how to work on that particular system. There's a lot of certification, a lot of equipment issues, management issues. So you want the company to work on it that's responsible for it.' (Tech. Conf. Tr. at 64).

conference.[4] Accordingly, because of legal, safety and reliability reasons, the Department should not propose to the Legislature that it allow municipalities to transfer pole attachments or remove double-pole sets.

C. The Department Should Allow the Electric Companies and Verizon MA to Implement the PLM System Without the Threat of Penalties.

In addition to directing the Department to review whether municipalities should be granted enforcement powers over the Section 34B, Section 110 also seeks the Department's recommendations regarding whether the state should enforce Section 34B though the imposition of penalties. As discussed below, because the pole tenants have the primary duty to move their attachments, and because the Electric Companies and Verizon MA may not be able to collect penalties imposed on them to pole tenants without protracted litigation, the Department should not recommend to the Legislature that it be granted powers to impose penalties on the Electric Companies or Verizon MA to enforce the provisions of Section 34B.

The process of transferring pole attachments involves several parties, some under the jurisdiction of the Department, and others not. For example, on a given double-pole set owned by NSTAR Electric, the "old" pole may have the following facilities attached that would need to be moved to the newer pole in the set prior to the removal of the "old"

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[4] Mr. Voutour noted that: "if you get nontalented people in there working on [transferring pole attachments], and particularly if they're going to work for the City, under the City auspices, if we have somebody go out there and somebody throws out 10,000 customers on the phone system, who is going to get the calls? Verizon is going to wind up with the calls, or if the cable TV goes out, it's going to be because our guy did it." (Tech. Conf. Tr. at 64).

God forbid something happens like that and somebody is trying to dial 911 at the same time. Who owns the lawsuit? We own it, because of the flow of how it's going to happen. So I don't think that's any business we want to get into, to be out there managing, transferring others' cables. Particularly with power companies, you need all certifications and equipment and all that stuff. The communications, we don't want to be knocking people's phones out. That's not going to work for us either." (Tech. Conf. Tr. at 64-65).

pole: (1) electric facilities owned by NSTAR Electric; (2) Verizon MA-owned facilities; (3) cable television-owned facilities; (4) competitive local exchange carrier facilities; and (5) municipal safety facilities While the electric facilities owned by NSTAR Electric are clearly within NSTAR Electric's power to move, the facilities owned by Verizon MA, cable television companies, municipalities and competitive local exchange carriers may not be moved by NSTAR Electric unless those companies are given an opportunity to move their facilities after notice.

Moreover, facilities must be moved in a particular sequence. To the extent that one attacher fails to move an attachment in a timely manner, the remaining attachments cannot be moved and the pole owner cannot remove the "old" pole in the set. In addition, NSTAR Electric does not have written pole attachment agreements with municipalities that place safety facilities on NSTAR Electric poles and, therefore, the timing of the movement of municipal attachments to new poles is not governed by established, enforceable contractual terms. Accordingly, it would be improper for the Department enforce the provisions of Section 34B through penalties issued to pole owners because the pole owners are not solely responsible for the movement of pole attachments.

However, even if the Legislature granted the Department or municipalities the authority to impose a penalty on a pole owner relating to the existence of double poles, the procedural and substantive legal issues that must be addressed to impose such a penalty would ultimately be a counterproductive policy to effect the enforcement of Section 34A. The imposition of penalties by the Department, or any governmental agency, may occur only after a determination of culpability in the context of an adjudicatory hearing. Penalties, by their very nature, are designed as a sanction for

improper conduct. See Commonwealth v. Amcan Enterprises, Inc., 47 Mass. App. Ct. 330 (1999) citing 15 U.S.C. § 45(m)(1)(C) ("in determining the amount of…a civil penalty [for violating a consumer protection statue], the court shall take into account the degree of culpability…), see also Commonwealth v. Fall River Motor Sales, Inc., 409 Mass. 302, at 311 (1991). Even a civil penalty imposed by an administrative agency must be based on a finding of wrongdoing after proper notice and a hearing. See United States v. James Daniel Good Real Property, et al., 510 U.S. 43 (1993); Haverhill Manor Inc. v. Commissioner of Public Welfare, 368 Mass. 15 (1975); see also 220 CMR 99.00 et seq. (Department Dig-Safe regulations).

Therefore, if the legislature were to authorize the Department or municipalities to issue penalties for violations of Section 34B, constitutional requirements must be followed to permit companies to avail themselves of their due-process rights before a penalty may be imposed. Thus, the imposition of penalties would have to be based on a finding of imprudent behavior by a pole owner after proper notice and a hearing. It could not be imposed automatically or arbitrarily on a theory of strict liability. Aside from voluntary programs proposed by companies, this is the process that the law requires and has been followed by the Department in the past. See Nantucket Electric Company, D.P.U. 95-7C-1 (1996) (performance review); Fitchburg Gas & Electric Light Company, D.P.U. 95 -5A -1 (1995) (performance review); Boston Edison Company, D.P.U. 94-1A-1 (1995) (performance review); Boston Gas Company, D.P.U. 555-C (1983) (gas shortage investigation). Accordingly, attempting to enforce Section 34B through the imposition of penalties would be far less efficient and effective than working with the Electric Companies and Verizon MA to continue to implement the PLM system.

The resources of pole owners (and the Department) should be not be diverted from efforts to minimize the presence of double poles to pursuing time-consuming administrative or court proceedings to determine, on a case-by-case basis, the culpable party (if any) for a persistent double-pole.

Moreover, the imposition of penalties on pole owners is not a reasonable means of penalizing those who are tardy in moving their pole attachments. Certain municipalities suggested that, to the extent that a pole owner is fined for failure to remove a double-pole set, the pole owner could allocate a portion of any fine to the pole tenant that failed to move its facilities in a timely manner (Tech. Conf. Tr. at 3-4). However, pole owners would have to enforce such agreements through litigation, either before the Department or in court, in the event a pole tenant refused to take responsibility for the untimely movement of its facilities on a double-pole set. Therefore, both in the first instance when the Department, or other governmental agency, may attempts to impose a penalty on the pole owner, or in the next instance where a pole owner may attempt to collect an imposed penalty on a pole tenant, litigation relating to the imposition of penalties is far less efficient than allowing the Electric Companies and Verizon MA to improve the systems that will minimize the number of double-pole sets. Accordingly, the Department should not recommend to the Legislature that it grant authorization to the Department to levy penalties against pole owners to enforce Section 34A.

IV. CONCLUSION

As described above, the Electric Companies and Verizon MA have been working diligently since early last year to design and implement the PLM system to facilitate the removal of double-pole sets. Accordingly, the Department's efforts over the past two

years to work with the Electric Companies and Verizon MA to identify problems associated with the historical means of tracking double-pole sets has succeeded in facilitating the mitigation of double-pole sets through better coordination between pole owners and pole tenants. The system is new and will undoubtedly be upgraded over time as experience dictates. Accordingly, rather than recommend to the Legislature that Section 34B be enforced by either: (1) municipalities; or (2) Department-imposed penalties, the Department should continue to allow interested parties to work together to evaluate and to enhance the PLM system and further refine its performance.

Respectfully submitted,

NSTAR ELECTRIC

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